in the

Supreme Court of the United States

OCTOBER TERM, 1978

NO. 78-1540

GLENN M. GREENWALD,
Petitioner,

vs.

THE CITY OF
NORTH MIAMI BEACH, FLORIDA and
THE UNITED STATES
DEPARTMENT OF LABOR,
Respondents.

Petition For A Writ of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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RESPONDENT CITY OF NORTH MIAMI BEACH, FLORIDA BRIEF IN OPPOSITION

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RESPONDENT CITY OF NORTH MIAMI BEACH, FLORIDA BRIEF IN OPPOSITION

The Respondents, through their counsel, Sidney B. Shapiro and Howard B. Lenard, City Attorney's Office, City of North Miami Beach, Florida, respectfully request that this Court deny the Petition for a Writ of Certiorari, seeking review of the Fifth Circuit's Per Curiam opinion in this case. That opinion is recorded at 587 F. 2d 779 (1979) and is reproduced as Appendix A.

STATEMENT OF FACTS

Petitioner Glenn Greenwald was terminated from his job with the City of North Miami Beach on August 26, 1977. Greenwald then filed an appeal of the City Manager's decision to the local Civil Service Board. Petitioner's statement of facts does not completely comport with the record below. Petitioner characterizes the wholly independent, local Civil Service Board as a State body, (Petitioner's Writ, Page 8). The local Civil Service Board derives its character from the City of North Miami Beach's Charter and is independent to and in no manner precludes other remedies available to any employee of the City of North Miami Beach.

On December 1, 1977, after attorneys representing Petitioner had the opportunity to present evidence, cross examine witnesses and test all evidence, the Civil Service Board upheld the action of the City Manager in discharging Greenwald. Petitioner had access to legal counsel from the point of termination throughout all stages of litigation. On December 21, 1977, approximately one hundred fifteen (115) days after being dismissed by the City Manager, Greenwald filed his complaint under the Safe Drinking Water Act with the Secretary of Labor.

The Safe Drinking Water Act has a thirty (30) day statute of limitations which is a jurisdictional requirement.

QUESTIONS PRESENTED

1. Where a Federal Remedy is supplementary and concurrent to the remedies provided by the Charter of the City of North Miami Beach, and where the latter need not be first sought and refused before the Federal Remedy can be invoked, does utilization of the local remedy toll the running of the Federal Remedy?

2. Is the statutory period for filing a Federal Discrimination claim tolled during the pursuit of independent remedies?

3. Can equitable principles be invoked to toll the statute of limitations when these principles are not applicable to the present case?

REASONS WHY THE WRIT SHOULD BE DENIED

Petitioner's claim of discrimination allegedly arises under the Federal Safe Drinking Water Act (SDWA), 42 U.S.C. §300f *et seq.* That act makes it a violation for an employee to be discharged because he ". . . participated . . . in any . . . action to carry out the purposes of the SDWA", 42 U.S.C. §300j-9(i). The Act then creates a Federal cause of action in favor of "[A]ny employee who believes that he has been discharged . . . in violation of the SDWA," *id.* To avail himself of the statutory cause of action an employee is required by the Act to file a complaint with the Secretary of Labor

"[W]ithin thirty (30) days after such violation (i.e. the alleged discriminatory discharge) occurs," *id.* The Act then specifies the details of the administrative hearing within the Department of Labor, final order by the Secretary, and the employee's right to appeal an adverse ruling to the United States Court of Appeals.

The Safe Drinking Water Act contains no prerequisite or exhaustion requirement to a claimant's right to file a discrimination claim. There is no requirement to first exhaust all other possible actions he may have, whether it be in tort, contract or via Civil Service.

Conspicuously absent from Petitioner's brief is this Court's decision in *International Union of Electrical Workers, Local 790 vs. Robins & Myers, Inc.*, 429 U.S. 229 (1976). There is no need for the Supreme Court to retreat from that recently adopted position that an employee's right to appeal his dismissal under local Civil Service procedures is completely independent of his claim of discrimination arising under Federal Statutes.[1] Further, where a Federal discrimination claim is independent of other remedies, the statutory period for invoking it will not be tolled while the other remedies are pursued. See *Johnson vs. Railway Express Agency, Inc.*, 421 U.S. 454 (1975).

In the petition filed herein, no substantial issues are raised to warrant review by this Court. In numerous

[1]The Courts of Florida have recently addressed a similar question presented herein. See *Board of Commissioners of the Lower Florida Keys Hospital District vs. Lowery*, 362 So.2d 287, (3rd Fla. App. 1978).

decisions by this Court the issue which petitioner attempts to raise have been addressed and the rules articulated in several recent Supreme Court cases.

The Supreme Court unanimously ruled in *Alexander vs. Gardner-Denver Company*, 415 U.S. 36 (1974), that a discharged employee's Federal discrimination claim (under Title VII) is wholly independent of other remedies, that Title VII was intended by Congress "[T]o supplement, rather than supplant, existing laws and independent institutions relating to employment discrimination." 415 U.S. 36, 48-49 (1974).

The Supreme Court has refused to permit the tolling of the Statute of Limitations in two (2) recent cases very similar to the present one. Each was a suit by a discharged employee claiming discrimination under a Federally created cause of action. In *Johnson vs. Railway Express Agency, Inc.*, 421 U.S. 454 (1975), this Court held that the Statute of Limitations governing suits under 42 U.S.C. 1981 would not be tolled while the employee pursued remedies under Title VII, 42 U.S.C. §2000e. In *International Union of Electrical Workers, Local 790 vs. Robins & Myers, Inc.*, 429 U.S. 229 (1976), this Court held that the ninety (90) day statutory period for filing a complaint under Title VII would not be tolled while the employee pursued grievance procedures under a collective bargaining agreement.

Both decisions relied heavily on the reasoning in *Alexander*, supra, that a Federal discrimination claim is independent of all other remedies. Each decision by this Court held that the statute of limitations would run from the date of the alleged discriminatory act, namely,

the date the employee was fired. The cases show that the discrimination claim would not be tolled during pursuit of an independent remedy whether the remedy is statutory as in *Johnson,* supra, or based on the employment contract as in *International Union,* supra. After these cases, it cannot be contended that there is confusion and conflict by and between the circuits.

The fact that Congress established a thirty (30) day time limit on discrimination actions under the SDWA — a limit both specific and unambiguous — prevents a Court or Administrative Agency from entertaining untimely claims. A limitation on bringing an action expressed by Congress in the same Act that created the cause of action, operates as more than merely a general statute of limitations. It defines the cause of action itself and it limits the jurisdiction of the Court to hear the action. The principle was stated in *The Harrisburg,* 119 U.S. 199, 214 (1886): "[W]here statutes create a new liability . . . the time within which the suit must be brought operates as a limitation of the liability itself as created and not of the remedy alone." See *Guy vs. Robins & Myers, Inc.,* 525 F.2d 124 (6th Cir. 1975); *International Union of Electrical Workers, Local 790 vs. Robins & Myers, Inc.,* 429 U.S. 229 (1976).

The Supreme Court has ruled with respect to a Title VII discrimination claim that when the statute specifies with precision the jurisdictional prerequisites that an individual must satisfy before he is entitled to institute a lawsuit, then Congress has spoken with respect to what it considers an acceptable delay. See *Alexander,* supra. p. 47 and *International Union,* supra. p. 240. The same considerations apply to the thirty (30) day period for bringing actions under the SDWA.

The Fifth Circuit Court of Appeals in its decisions has applied standards as established by this Court. Petitioner attempts to raise several cases which are allegedly in conflict with the Fifth Circuit's ruling but which, in reality, are not.

No conflict exists between the other Circuits and the Fifth Circuit of Appeals when the latter applied the articulated standards of the United States Supreme Court. Some Courts have found compelling reasons for tolling a statute of limitations and have cited the broad language in *Burnett vs. New York Central Railroad,* 380 U.S. 424, 428 (1965), that the policy behind such statutes is "[F]requently outweighed. . .where the interests of justice required vindication of the Plaintiff's rights." The Fifth Circuit in rendering its per curiam opinion was applying the standard articulated by this Court in *International Union of Electrical Workers, Local 790 vs. Robins & Myers, Inc.,* 429 U.S. 229 (1976). The language of *Burnett,* supra, is greatly curtailed by the Supreme Court's opinion in *International Union,* 429 U.S. 237-38, where this Court emphasized the special facts of the *Burnett* case. In *Burnett* the statute was tolled because the Plaintiff had filed the same statutory claim in a different form, but the claim was dismissed for improper venue. In the present case as in

International Union, supra, the Plaintiff had filed a completely different independent claim.[2]

Furthermore, *Burnett,* involved a state's general statute of limitations while the present case and *International Union,* supra, involved a specific limitation written by Congress into the statute creating the cause of action.

Finally, cases cited in Petitioner's Writ of Certiorari are either stale, clearly distinguishable on their facts, or have been addressed by Supreme Court Mandate. The instant case is not in conflict with prior Supreme Court rulings and therefore no need exists to further explore the Fifth Circuit Court of Appeals' ruling.

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[2]Basically, Federal Discrimination Statutes are designed to provide independent remedies where past history reflected to gap to discriminatory wrongs. These causes are designed to primarily bring actions against the violating governmental entities. In light of the doctrine of Sovereign Immunity, Congress creates jurisdiction with limited time periods to bring an action against a governmental entity. These filing periods are a safeguard to a governmental entity such as a city from unlimited liability. In the case *sub judice,* in the unlikely event that Petitioner would prevail, his remedy would be payment of back wages. So, in this case, the petitioner's delay in filing his Federal claim would allow him to unilaterally increase his own damages. Petitioner's untimely filing would create an undue hardship on Respondent City of North Miami Beach and in essence any entertainment of Petitioner's claim would create a judicial wedge to closing the door on untimely and improper claims for relief.

CONCLUSION

For these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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with
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APPENDIX

APPENDIX A

Glenn M. Greenwald, Petitioner,

v.

The City of
North Miami Beach, Florida,
and the United States
Department of Labor, Respondents.

No. 78-1945

Summary Calendar.

UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT

January 12, 1979

City employee who was discharged petitioned for review of action of Secretary of Labor in dismissing his complaint alleging that the had been discharged in violation of the Safe Drinking Water Act. The Court of Appeals held that city employee's complaint which was filed 115 days after alleged improper discharge although only 20 days after local civil service board upheld employee's termination was untimely.

Petition dismissed.

1. Labor Relations

City employee's complaint alleging a discharge in violation of Safe Drinking Water Act, which complaint

was filed with Secretary of Labor 115 days after alleged improper discharge although only 20 days after local civil service board upheld employee's termination, was untimely. Safe Drinking Water Act, §§1401-1450, 1450(i) (1,2), 42 U.S.C.A. §§300f to 300j-9, 300j-9(i) (1,2); Safe Drinking Water Amendments of 1977, §11(b), 42 U.S.C.A. §300j-10.

2. Labor Relations

Safe Drinking Water Act does not require exhaustion of state or local remedies prior to filing of complaint with the Secretary of Labor. Safe Drinking Water Act, §§1401-1450, 1450(i) (1,2), 42 U.S.C.A. §§300f to 300j-9, 300j-9(i) (1,2); Safe Drinking Water Amendments of 1977, §11(b), 42 U.S.C.A. §300j-10.

3. Labor Relations

Remedy provided by Safe Drinking Water Act is entirely independent of any local remedies. Safe Drinking Water Act, §§1401-1450, 1450(i)(1, 2), 42 U.S.C.A. §§300f to 300j-9, 300j-9(i)(1, 2); Safe Drinking Water Amendments of 1977, §11(b), 42 U.S.C.A. §300j-10.

4. Labor Relations

Fact that city employee allegedly discharged in violation of Safe Drinking Water Act sought local civil service board review of his discharge did not toll 30-day time limitation for filing claim under Act with Secretary of Labor. Safe Drinking Water Act, §§1401-1450, 1450(i)(1, 2), 42 U.S.C.A. §§300f to 300j-9, 300j-9(i)(1, 2); Safe Drinking Water Amendments of 1977, §11(b), 42 U.S.C.A. §300j-10.

Leopold & Leopold, Karen Leopold, Maurice Rosen, North Miami Beach, Fla., for petitioner.

Carin A. Clauss, Sol. of Labor, U.S. Dept. of Labor, Barbara A. Babcock, Asst. Atty. Gen., Michael F. Hertz, Thomas G. Wilson, Attys., App. Section, Civil Div., Dept. of Justice, Washington, D.C., Howard B. Lenard, Deputy City Aty., Sidney B. Shapiro, City Atty., N. Miami Beach, Fla., for respondents.

Petition for Review of a Decision of the Secretary of Labor Under the Safe Drinking Water Act.

Before BROWN, *Chief Judge,* COLEMAN and VANCE, *Circuit Judges.*

PER CURIAM.

The crucial issue in this case is whether or not the petitioner, Glenn M. Greenwald, timely filed his complaint with reference to his discharge as an employee of the City of North Miami Beach, in which he alleged that he had been discharged in violation of the Safe Drinking Water Act (the Act), 42 U.S.C. §§300f to 300j-10.[1]

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[1]Section 1450(i) of the Act, 42 U.S.C. §300j-9(i)(1) provides:

> No employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee) has —
>
> (A) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this subchapter or a proceeding for the administration or en-

The Administrative Law Judge held that the complaint had not been filed within the time required by law. The Secretary of Labor agreed and dismissed the complaint. Mr. Greenwald petitioned this Court for review.

We agree with the findings of fact and conclusions of law of the Administrative Law Judge, as affirmed by the Secretary, and dismiss the petition for review.

The Act provides that any employee who believes that he has been discharged in violation of the Act may file a complaint with the Secretary of Labor within 30 days after the violation occurs.[2] In this case, Mr.

forcement of drinking water regulations or underground injection control programs of a State,

(B) testified or is about to testify in any such proceeding, or

(C) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other action to carry out the purposes of this subchapter.

[2]42 U.S.C. §300j-9(i)(2) provides as follows:

(2)(A) Any employee who believes that he has been discharged or otherwise discriminated against by any person in violation of paragraph (1) may, within 30 days after such violation occurs, file (or have any person file on his behalf) a complaint with the Secretary of Labor (hereinafter in this subsection referred to as the "Secretary") alleging such discharge or discrimination. Upon receipt of such a complaint, the Secretary shall notify the person named in the complaint of the filing of the complaint.

(B)(i) Upon receipt of a complaint filed under subparagraph (A), the Secretary shall conduct an investigation

of the violation alleged in the complaint. Within 30 days of the receipt of such complaint, the Secretary shall complete such investigation and shall notify in writing the complainant (and any person acting in his behalf) and the person alleged to have committed such violation of the results of the investigation conducted pursuant to this paragraph. Within 90 days of the receipt of such complaint the Secretary shall, unless the proceeding on the complaint is terminated by the Secretary on the basis of a settlement entered into by the Secretary and the person alleged to have committed such violation, issue an order either providing the relief prescribed by clause (ii) or denying the complaint. An order of the Secretary shall be made on the record after notice and opportunity for agency hearing. The Secretary may not enter into a settlement terminating a proceeding on a complaint without the participation and consent of the complainant.

(ii) If in response to a complaint filed under subparagraph (A) the Secretary determines that a violation of paragraph (1) has occurred, the Secretary shall order (I) the person who committed such violation to take affirmative action to abate the violation, (II) such person to reinstate the complainant to his former position together with the compensation (including back pay), terms, conditions, and privileges of his employment, (III) compensatory damages, and (IV) where appropriate, exemplary damages. If such an order is issued, the Secretary, at the request of the complainant, shall assess against the person against whom the order is issued a sum equal to the aggregate amount of all costs and expenses (including attorneys' fees) reasonably incurred, as determined by the Secretary, by the complainant for, or in connection with, the bringing of the complaint upon which the order was issued.

Greenwald was discharged on August 26, 1977, but did not file a complaint with the Secretary of Labor until 115 days later, on December 21, 1977. To be sure, this was only 20 days after the local Civil Service Board upheld the action of the City Manager in terminating Greenwald's employment. But the Act does not require the exhaustion of state or local remedies prior to the filing of a complaint with the Secretary. Moreover, the remedy provided by the Act is entirely independent of any local remedies. Thus, the fact that Greenwald sought local Civil Service Board review of his discharge did not toll the 30-day time limitation for filing a claim under the Act. *See also International Union of Electrical, Radio & Machine Workers v. Robbins & Myers, Inc.*, 1976, 429 U.S. 229, 97 S.Ct. 441, 50 L.Ed.2d 427 (pursuit of collective bargaining grievance procedures does not toll running of the limitations period within which complaint of racial discrimination must be filed with the EEOC, as Title VI remedies are independent of other pre-existing remedies available to an aggrieved employee).

PETITION DISMISSED.